No. 87-1372

In the

# Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

*Petitioner,*

*v.*

AMERADA HESS SHIPPING CORPORATION and UNITED CARRIERS, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## Questions Presented

1. Whether the Alien Tort Statute of 1789 provides jurisdiction over a claim by a neutral shipowner, engaged in the United States domestic trade, for an illegal attack against its vessel on the high seas by a foreign state, where the state has also declined redress in violation of international law.

2. Whether the Foreign Sovereign Immunities Act of 1976 ("FSIA") must be construed as preempting the Alien Tort Statute, and as extending immunity to foreign states where international law would not accord it.

3. Whether (i) admiralty jurisdiction and (ii) universal jurisdiction are present in this case.

4. Whether jurisdiction is present in this case under FSIA.

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The caption of the case in this court contains the names of all the parties.

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### Opinions Below

The opinion of the court of appeals (Pet. App. 1a-21a[1]), is reported at 830 F.2d 421 (1987). The opinion of the United States District Court for the Southern District of New York (Pet. App. 25a-35a) is reported at 638 F. Supp. 73 (1986).

### Jurisdiction

The judgment of the court of appeals was entered September 11, 1987 (Pet. App. 22a). The petitioner's petition for rehearing and suggestion for rehearing *en banc* were denied on November 18, 1987 (Pet. App. 24a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### Treaty Provisions and Statutes Involved[2]

1. The Merchant Marine Act of 1920, 28 U.S.C. § 877, reads in relevant part as follows:

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[1] "Pet. App." refers to pages in the Appendix to the Petition.

[2] Treaties and statutes cited herein are in addition to those in the Petition at pp. 2-4.

**§ 877. Coastwise laws extended to island Territories and possessions**

From and after February 1, 1922, the coastwise laws of the United States shall extend to the island Territories and possessions of the United States . . . . *And provided further*, That the coastwise laws of the United States shall not extend to the Virgin Islands of the United States until the President of the United States shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands and fix a date for the going into effect of same.

2. The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1330, 1602-1611, reads in relevant part as follows:

**§ 1603. Definitions**

For purposes of this chapter—

. . . .

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

3. The Pan American Convention Relating to Maritime Neutrality of 1928 , 47 Stat. 1989, reads in relevant part as follows:

*Belligerents to respects rights of neutral Powers.*

Article 1. Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

. . . .

*Section IV.—Fulfilment and Observance of the Laws of Neutrality*

ART. 27. A belligerent shall indemnify the damage caused by its violations of the foregoing provisions. It shall likewise be responsible for the acts of persons who may belong to its armed forces.



4. The Geneva Convention on the High Seas of 1958, 13 U.S.T. 2312, reads in relevant parts as follows:

5. Where hot pursuit is effected by an aircraft:
(a) The provisions of paragraphs 1 to 3 of the present article shall apply *mutatis mutandis;*
(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

. . . .

7. Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

5. The Treaty of Friendship, Commerce, and Navigation Between the United States of America and Liberia of 1938, 54 Stat. 1739, reads in relevant parts as follows:

ARTICLE I

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well as for prosecution as for defense of their rights, and all decrees of jurisdiction established by law.

. . . .

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in

> this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

## Statement of the Case

In 1977, United Carriers, Inc. ("United"), owner of the oil tanker HERCULES, time-chartered that vessel to Amerada Hess Shipping Corporation ("Amerada Hess").[3] The agreement between Amerada Hess and United contained a charter hire payment clause which provided that monthly payments to United for the use of HERCULES were to be made in New York (A41).[4]

From the opening of the Trans-Alaska Pipeline System in 1977 until the incident which forms the basis of these actions, HERCULES was continuously employed by Amerada Hess in the United States domestic trade, carrying crude oil from Alaska around the southern tip of South America to its refinery in the U.S. Virgin Islands. The Liberian flag HERCULES was permitted to sail in the coastwise trade of the United States—which is otherwise restricted exclusively to American flag vessels by the cabotage provisions of the Merchant Marine Act of 1920[5]—under a narrow exception to the cabotage laws exempting trade between ports of the United States Virgin Islands and ports of the United States and its territories.[6]

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[3] Amerada Hess Shipping Corporation, a Liberian corporation, is a subsidiary of Amerada Hess Corporation, incorporated in the State of Delaware, United States.

United Carriers, Inc., is a privately held corporation organized and existing under the laws of the Republic of Liberia. United is a subsidiary of one privately held foreign corporation, and is affiliated with various foreign corporations, all of which are privately held. The shares of United, its parent and affiliates are not publicly traded.

[4] "A" refers to page references in the Joint Appendix on record in the court of appeals.

[5] 46 U.S.C. § 883.

[6] 46 U.S.C. § 877. The peculiar status of HERCULES as a foreign-flag vessel trading in domestic, interstate U.S. commerce was determined in *American Maritime Ass'n v. Blumenthal*, 590 F.2d 1156, 1158-1160, 1166-1168 (D.C. Cir. 1978), showing, for example, that

(*footnote continued on following page*)



HERCULES routinely transitted the South Atlantic[7] where, in April 1982, an armed conflict broke out between the Argentine Republic ("Argentina") and the United Kingdom which has since become known as the Falklands/Malvinas War. On May 25, 1982, HERCULES departed the Virgin Islands in ballast, although fully fueled, an a return voyage to Alaska. On June 3, 1982, the United States Maritime Administration transmitted to both the Argentine Republic and the United Kingdom a list of United States flag ships and United States interest ships—including HERCULES—which would be crossing the South Atlantic, in an effort to ensure safe passage there for these neutral merchant vessels (A60). During her voyage through the South Atlantic, HERCULES continued her usual practice of keeping the United States Coast Guard informed of her course, speed, cargo and destination through a radio station operated by the Argentine government (A62, A67-68, A70, A77).

Without provocation or warning, on June 8, 1982, Argentine military aircraft subjected the neutral HERCULES to three separate bombing strikes, at a point on the high seas well outside the exclusion zones declared by the parties to the conflict.[8] Although not destroyed, HERCULES suffered extensive damage from the attacks, and later had to be scuttled due to the unreasonable hazard involved in attempting to remove an undetonated bomb lodged in one of her tanks. Amerada Hess suffered the loss of $1,901,257.07 in fuel which went down with the vessel. United's loss came to $10,000.00

Subsequent attempts by respondents to obtain redress in Argentina for the loss of HERCULES were to no avail. Formal

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(*footnote continued from preceding page*)

typically 83% of the refined products derived from HERCULES' cargoes was consumed in the continental United States, with the balance purchased directly by the U.S. government, at 1158 incl. n. 10.

[7] The vessel's width precluded passage through the locks of the Panama Canal.

[8] Shortly after the bombing, the Republic of Liberia sought clarification of the incident from Argentina by diplomatic notes, and a formal oral demarché regarding the unprovoked attack was delivered to a senior official of the Argentine embassy in Washington by the U.S. Department of State (A131). Argentina never responded to either of these communications.

demands for restitution presented to the government of President Alfonsín were rejected. Leading Argentine law firms approached by respondents, in turn, declined—evidently for political reasons—to pursue Amerada Hess' and United's claims against their government in the Argentine courts (A136-A216).

Unable to obtain so much as a hearing of their claims in Argentina, on June 7, 1985, Amerada Hess and United brought suit against the petitioner in the United States District Court for the Southern District of New York. Respondents sought damages in tort for the loss of the vessel and bunkers (ship's fuel), and alleged that Argentina had violated international law in attacking, without cause, the neutral merchant vessel HERCULES on the high seas, and thereafter in refusing to pay compensation.

The jurisdiction of the district court was invoked under the Alien Tort Statute, under the general admiralty and maritime jurisdiction, and under the principle of universal jurisdiction recognized in international law. Petitioner moved to dismiss under F.R. Civ. P. 12(b) for lack of subject matter and personal jurisdiction, on the ground that FSIA was the sole source of jurisdiction in all suits against foreign states, and that petitioner was immune from suit under that act for the violations of international law alleged by Amerada Hess and United.

The district court dismissed respondents' complaints for lack of subject-matter jurisdiction. The court held that "a foreign state is subject to jurisdiction in the courts of this country if, and only if, an FSIA exception empowers the court to hear the case" (Pet. App. 29a). In so holding, the court recognized that its interpretation of FSIA narrowed the jurisdictional scope encompassed by the language of the Alien Tort Statute (Pet. App. 32a). To the district court it was "irrevelant that repeal by implication is disfavored" since, in the court's view, the elimination of a class of defendants under the Alien Tort Statute effected no repeal (Pet. App. 32a-33a). The court ruled that respondents' claims fell outside of "the exceptions to blanket foreign sovereign immunity provided by the FSIA" (Pet. App. 30a), and further found that respondents could "claim no loss whatsoever occurring in the United States" (*ibid.*).



The court of appeals reversed, holding that the Alien Tort Statute provides jurisdiction over respondents' claims, and that the FSIA does not bar it (Pet. App. 3a).[9]

The court initially examined whether the facts alleged by respondents were sufficient to state a violation of international law. Finding that the right of innocent neutral ships to free passage on the high seas was recognized in a series of "international treaties and conventions dating at least as far back as the last century," that "federal courts have long recognized in a variety of contexts that attacking a merchant ship without warning or seizing a neutral's goods on the high seas requires restitution," and that the academic literature was similarly "of one voice with regard to a neutral's right of passage," the court concluded that it was "beyond controversy that attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law."

The court next determined that respondents' actions met the requirements for federal district court jurisdiction set forth in the Alien Tort Statute. The court held that:

> Although seldom employed, the Alien Tort Statute means what it says. If an alien brings a suit, for a tort only, that sufficiently alleges a violation of the law of nations, then the district court has jurisdiction. See *Filartiga*, 630 F.2d 876. All of these requirements are met in the instant case. Appellants are aliens; they are Liberian corporations. This suit is for a tort only—the bombing of a ship without justification. Also . . . the suit alleges a violation of international law. (Pet. App. 7a-8a).

The court rejected petitioner's contention that the Alien Tort Statute could only be invoked against individual defendants, since Congress did not explicitly provide for jurisdiction over states and absolute sovereign immunity was recognized at the time of its enactment. While expressing doubt as to whether absolute sovereign immunity would have governed then under

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[9] A dissenting opinion was filed by one member of the panel.

the circumstances of this case,[10] the court held that the jurisdictional grant of the Alien Tort Statute is to be construed according to current standards of international law (Pet. App. 8a-9a).

The court found that modern international law does not extend immunity to states for international law violations. Noting, *inter alia,* such developments in this century as the rejection of sovereign immunity defenses by the Nuremberg tribunal and the emerging international law prohibition of genocide, the court reasoned that, were the result otherwise, "the exception would nearly swallow the rule" and international law, even in theory, would have little meaning (Pet. App. 9a-10a). Having established that the sinking of a neutral vessel on the high seas without justification violates a substantive principle of international law for which there is no immunity, the court held that the Alien Tort Statute provides jurisdiction over Argentina (Pet. App. 10a).

The court then addressed petitioner's argument that the jurisdictional grant of the Alien Tort Statute was preempted by FSIA. While the court held that FSIA as a general rule is the sole basis for United States jurisdiction over foreign states, it found that the act's principal goals—to restrict the rules of immunity respecting the commercial activities of states, to remove immunity decisions from the executive to the judicial branch so as to ensure these decisions were made on purely legal grounds, and to unify the rules of procedure relating to suits against foreign states—did not evince an intent on the part of Congress to extinguish existing remedies in United States courts for violations of international law of the type alleged by respondents (Pet. App. 11a-13a).

Since Congress had expressed its intent to incorporate standards recognized under international law in its enactment of FSIA, and moreover had left the Alien Tort Statute intact, the court held that FSIA would not bar jurisdiction under the unusual circumstances of this case (Pet. App. 13a). The court

[10] The court had earlier observed that "[w]here the attacker has refused to compensate the neutral, such action is akin to piracy, one of the earliest recognized violations of international law" (Pet. App. 7a).



found personal jurisdiction over Argentina was proper since, *inter alia,* the act complained of was tortious injury to a vessel plying the United States domestic trade pursuant to a contract calling for payment in the United States, and the United States government's direct communication to Argentina of its interest in HERCULES' safety was sufficient to put Argentina on notice that it might be sued here. The court was further mindful of considerations of fairness, since respondents had been denied an Argentine forum in which to pursue their claims.

The court emphasized that its holding "is a narrow one," and that—

> [i]t should also be noted that the burden on a plaintiff moving under the Alien Tort Statute remains great. The class of actions that are recognized as international law violations, as distinguished from a mere tort, is quite small. Moreover the sovereign defendant or its action must have sufficient contacts to satisfy the constitutional requirements of personal jurisdiction. And finally, the procedural requirements of the FSIA, restricting execution of judgment for example, see *Letelier v. Republic of Chile,* 748 F.2d 790 (2d Cir. 1984), cert. denied, 471 U.S. 1125, 105 S.Ct. 2656, 86 L.Ed. 2d 273 (1985) would still have to be considered . . . .

The dissent did not address itself to the meaning of the Alien Tort Statute, or to the question of immunity under international law for the actions complained of by respondents, since it concluded that FSIA had foreclosed consideration of respondents' claims.

## REASONS FOR DENYING THE WRIT

### A. The decision below upholds the right of a neutral ship to free passage on the high seas, and turns squarely on peculiar facts unlikely to recur.

The decision below is important, not for the reasons stated by petitioner, but as a contemporary reaffirmation of international law on the neutral's right of innocent passage in

modern warfare. The opinion carefully recites the overwhelming precedent under both American and international law, codifying and enforcing the neutral shipowner's private right under international law to restitution for violation of the right of innocent passage (Pet. App. 5a-7a). As Chief Judge Feinberg's opinion notes, "the relative paucity of cases litigating this customary rule of international law underscores the long standing nature of this aspect of freedom of the high seas." (Pet. App. 7a). Indeed, when neutral Argentine ships have been sunk by a belligerent, petitioner has adamantly demanded, and received, compensation.[11]

It is plain that petitioner's acts in unlawfully attacking a neutral ship on the high seas *and then* refusing the neutral a forum or compensation are wide of the mark universally accepted by states under international law. By diplomacy, private arbitration, or prize courts, virtually all states meet their compensation obligations under international law.[12] Argentina has consistenly failed to respond to all attempts to resolve this dispute, whether by diplomacy, negotiation or private arbitration. Argentina's responsibility for these high seas attacks on the neutral HERCULES is not in issue. Even the United States government admits that "Argentina should bear responsibility for its actions that are the subject of the instant litigation." (Brief for the United States as *Amicus Curiae* in Support of Appellee's Petition for Rehearing *En Banc*, filed September 29, 1987.) Further review by this Court of the neutral shipowner's right of innocent passage, one of the most ancient "norms" of international law, is not warranted.

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[11] Argentina demanded and received compensation from Germany for the sinking of two neutral Argentine merchant ships on the high seas by U-boats. *New York Times*, August 24, 1917, p. 1., and Scheina, *Latin America, A Naval History—1810-1987* (1987), pp. 101-102.

[12] Recent non-prize cases show no waivering by foreign states in their obligation to honor restitution claims of neutral ships. In 1938, Japan paid $2,211,007 for restitution claims arising from attacks by Japanese Navy aircraft on USS PANAY and three neutral American oil tankers under her escort. Stanley, *Prelude to Pearl Harbor* (1965), n. 11 at 106); in 1944, the

(*footnote continued on following page*)



The holding in this case rests on unique facts unlikely to recur. The opinion below correctly recognized the special facts of this case and properly described its holding as "a narrow one." (Pet. App. 15a) As noted previously, the lawful participation of a foreign-flag ship like HERCULES in U.S. domestic trade derives from a 1920 anomaly created by Congress in this nation's cabotage laws for the U.S. Virgin Islands, 46 U.S.C. § 877. It was not until HERCULES' maiden voyage with Alaskan oil that this obscure statutory exception even came to the attention of the courts. *American Maritime Association v. Blumenthal*, 590 F.2d 1156 (D.C. Cir. 1978). The statute's express language makes its continued existence subject to unilateral action by the President.[13] Within the past three months, the Commission on Merchant Marine and Defense strongly recommended that the President consider closing the U.S. Virgin Islands "loophole." [14] These first-of-their-kind facts, involving a state attacking a foreign-flag ship in U.S. domestic trade, and then refusing compensation or a forum, are unlikely to recur. The statutory basis upon which the facts arose, so crucial to the decision below, is exceedingly narrow.

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(*footnote continued from preceding page*)

United States agreed to compensate the Soviet Union for damage sustained to the neutral Russian tanker EMBA, attacked on the high seas by a U.S. Army Air Force bomber. U.S. Government Printing Office, *Foreign Relations of the United States, Diplomatic Papers*, 1944, Vol. IV, at 990, 1031-1032; in 1987, an arbitration panel in Switzerland awarded British owners of the Greenpeace ship RAINBOW WARRIOR $5,000,000 in compensation and $1,200,000 in aggravated damages against France for the sinking of the ship by French frogmen, Oct. 2, 1987, *United Press International;* and in 1988, Iraq agreed to compensate the U.S. Government and survivors of the USS STARK, *The New York Times*, January 31, 1988, p. 9.

[13] "[T]he coastwise laws of the United States shall not extend to the Virgin Islands of the United States until the President of the United States shall, by proclamation, declare that such laws shall extend to the Virgin Islands . . . . " 46 U.S.C § 877.

[14] *The Second Report of The Commission on Merchant Marine and Defense: Recommendations*, December 31, 1987, pp. 2 and 20-21. Pursuant to P.L. 98-525, the Commission was established to report to the President and Congress on strengthening maritime transportation in a national emergency.

Foreign-flag shipping participation in U.S. domestic trade is by statute small and may be terminated at any time by either the President or Congress. The singular statutory framework giving rise to the facts in this case, when combined with petitioner's equally aberrant conduct in refusing to provide the injured neutral either a forum or compensation, highlight the unique character of this case and the unlikelihood of further cases of its kind.[15]

### B. The "conflicts" alleged by petitioner do not warrant review by this Court.

Contrary to petitioner's assertion that the decision below was rendered "in total disregard" of FSIA (Pet. 10), the court of appeals examined fully the purpose and provisions of that act, and in considering its effect on the Alien Tort Statute arrived at a result in this case which is consonant with international law and with long-standing principles of statutory construction.

It is axiomatic that repeals by implication are not favored, *Rodrigues v. United States*, 480 U.S. ___, 108 S.Ct. ___, 94 L.Ed.2d 533, 536 (1987). Absent Congressional intent to repeal which is "clear and manifest," where two statutes are capable of co-existence it is the duty of the courts to regard each as effective, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155-158 (1976). Moreover, it has long been settled that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," *The Charming Betsey*, 6 U.S. (2 Cranch) 64, 116 (1804) (Marshall, C.J.).

There is no mention of the Alien Tort Statute in FSIA, and the court of appeals in a close examination of the legislative history of that act found no intention on the part of Congress to remove existing remedies[16] in United States courts for

[15] This Court's own experience in deciding questions of a neutral shipowner's right to restitution against a foreign state is illustrative of the infrequency of these disputes in U.S. courts. The last case decided by this Court was *The Steamship Appam*, 243 U.S. 124 (1917).

[16] See 1 Op. Atty Gen 57-59 (1792); *Martins v. Ballard*, 16 F. Cas. 923 (D.S.C. 1794) (No. 9,175). The Supreme Court has also recognized in *O'Reilly de Camara v. Brooke*, 209 U.S. 45, 50 (1908), that jurisdiction under the Alien Tort Statute "depends upon the

(*footnote continued on following page*)



international law violations of the type presented by this case. Since a principal purpose of FSIA is to restrict immunity with regard to commercial activities, the court correctly reasoned that "it would be odd to hold that, by enacting a statute designed to narrow the scope of sovereign immunity in the commercial context, Congress, though silent on the subject, intended to broaden the scope of sovereign immunity for violations of international law" (Pet. App. 12a). As current international law denies immunity for such violations, the court declined to arrive at an interpretation of FSIA which would bring it into conflict with international law in the absence of clear Congressional intent. Rather than adopting an interpretation of FSIA which would effect an implied repeal of the Alien Tort Statute, the court *reconciled* the jurisdictional provisions of these two statutes in a manner consistent with the immunity rules of current international law.[17] As the court of appeals acknowledged (Pet. App. 16a), if Congress wishes to amend the Alien Tort Statute, it may do so, but it is not the province of the judiciary to rewrite the plain language of a statute, *United States v. Great Northern Railway Co.*, 343 U.S. 562, 575 (1957).

Respondents argued below that the result in this case is also proper under § 1605(a)(5) of FSIA. Under § 1603(c) of FSIA, the term "United States" includes "all territory and *waters*, continental and insular, *subject to the jurisdiction of the United States*" (emphasis added). The attack on HERCULES took place on the high seas, "waters . . . subject to the jurisdiction of the United States" For example, in *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865), the Supreme Court defined tort jurisdiction in admiralty as follows:

(*footnote continued from preceding page*)

establishment of a 'tort only in violation of the law of nations or a treaty of the United States,' " elements the plaintiff was unable to establish in that case.

[17] The Ninth Circuit has also recognized that exceptions to immunity in FSIA are "based upon the general presumption that states abide by international law and, hence, *violations of international law are not 'sovereign' acts*," *West v. Multibanco Comermex*, 807 F.2d 820, 826 (9th Cir. 1987), *cert. denied*, 55 U.S.L.W. 3807 (1987) (emphasis added).

> "Every species of tort, however occurring, and whether onboard a vessel or not, *if upon high seas* or navigable waters, is of admiralty cognizance." (Emphasis added)[18]

Under 28 U.S.C. § 1603(c), therefore, the tortious attack on HERCULES occured within the "United States." The loss of charter hire payments due to United in New York satisfies the statute's requirement of an "injury occurring within the United States," as does the disruption to Amerada Hess' American refining operations caused by the loss of use of the vessel. Accordingly, since both the tort and the injury occurred within the United States, jurisdiction may be found over Argentina under 1605(a)(5). *See* Brief of the Republic of Liberia as *Amicus Curiae*, dated September 10, 1987 (App. 1a). The issue of 1605 (a)(5) jurisdiction was not reached by the court of appeals, and would remain for determination on remand (Pet. App. 17a, n. 3).

There is no "conflict" engendered by the court of appeals' assertion of personal jurisdiction over Argentina. The court's consideration of fairness in its decision to exercise jurisdiction is entirely appropriate, since principles of equity are common to both federal common law and international law, *First National City Bank v. Banco Para El Com.*, 462 U.S. 611 (1983). Petitioner's argument that it is only the defendant's contacts with the forum which are relevant to an assertion of personal jurisdiction is erroneous. Personal jurisdiction may be based upon the *effects* which a defendant's actions have caused within the forum, *Calder v. Jones*, 465 U.S. 783 (1984). The action of Argentina in attacking the neutral HERCULES was directed against a vessel in the United States domestic trade, and resulted in the disruption of contractual payments due in the United States. The effect of Argentina's attack was to cause injury within the United States; the fact that the attack itself occurred on the high seas does not prevent a United States court from exercising jurisdiction over a cause of action arising out of that injury. *Id.* at 787-790.

[18] This was modified in *Executive Jet Aviation Co. v. Cleveland*, 409 U.S. 249 (1972) to "require also that the wrong bear a significant relationship to traditional maritime activity." *Id.* at 268.



Subsection (2)(k) of § 421 of the Restatement of Foreign Relations Law of the United States (Tent. Draft No. 6, April 12, 1985) ("Revised Restatement") recognizes a similar "effects" test with respect to jurisdiction to adjudicate under international law. Moreover, comment (a) to § 404 of the Revised Restatement, entitled "Universal Jurisdiction to Define and Punish Selected Offenses" makes it clear that universal jurisdiction is also recognized in "the corresponding section concerning jurisdiction to adjudicate (§ 423)." § 423 is concerned with the jurisdiction of states "to adjudicate in aid of universal and other non-territorial crimes." Comment (b) to § 404 makes it clear that universal jurisdiction may extend to civil cases. The principle of universality is plainly applicable, to both jurisdiction to prescribe and jurisdiction to adjudicate.

The decision of the court of appeals does not "conflict" with the decision in *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), nor does it "conflict" with any decision in the circuit courts. *Verlinden* examined FSIA to determine its constitutionality. The question of jurisdiction under the Alien Tort Statute is not presented in that case, any more than it is presented in any of the circuit court decisions relied on by petitioner.[19] *There has been no other decision in any circuit court as to the effect of these two statutes where a claim of violation of international law is asserted against a foreign state.* That issue has been decided in only three cases in the district courts, all of which concerned injuries alleged to have occurred *within the territory* of a foreign state.[20] In

[19] *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (Pet. 15, n. 5) involved alleged acts of terrorism, a subject as to which there is no international consensus. Although differing as to rationale, the panel held that jurisdiction had not been established under the Alien Tort Statute, and further that the action was time-barred. The references to FSIA in two of the concurrences are therefore dicta.

[20] *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985) (finding jurisdiction over the Soviet Union for violation of

(*footnote continued on following page*)

contrast, the decision below involves an injury occurring *on the high seas*, where the act-of-state doctrine does not apply, as well as the violation of principles which have been the subject of consensus among nations since ancient times. Respondents are aware of *no similar case in any court*, and the holding below, which is tied to singular facts, is too narrow to warrant review by the Court on certiorari.

## CONCLUSION

**For the foregoing reasons, the petition for a writ of certiorari should be denied.**

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(*footnote continued from preceding page*)
diplomatic immunity); *contra, In Re Korean Airlines Disaster of September 1, 1983*, 597 F. Supp. 613 (D.D.C. 1984) and *Siderman v. Republic of Argentina*, No. CV 82-1772-RMT (C.D. Cal., March 7, 1985). Further proceedings are pending in *Von Dardel* and *Siderman*.

# APPENDIX

**Brief of the Republic of Liberia as *Amicus Curiae* in the U.S. Court of Appeals for the Second Circuit**

# 86-7602,03

IN THE

## United States Court of Appeals

FOR THE SECOND JUDICIAL CIRCUIT

AMERADA HESS SHIPPING CORPORATION,
*Appellant,*

v.

ARGENTINE REPUBLIC,
*Appellee.*

85 CIV 4365 (RLC)

UNITED CARRIERS, INC.,
*Appellant,*

v.

ARGENTINE REPUBLIC,
*Appellee.*

85 CIV 4378 (RLC)

## BRIEF OF THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE*

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**APPEAL NOS. 86-7602, 03**

IN THE

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v.

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v.

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**85 CIV 4378 (RLC)**

## BRIEF OF THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE*

### Opinion Below

The Memorandum and Order of the United States District Court for the Southern District of New York is set forth in the joint Appendix to the Briefs, A. 541-53.

**Questions Presented**

(I) Whether the Treaty of Friendship, Commerce and Navigation between the United States and Liberia grants to appellants standing to litigate their claims in the Courts of the United States.

(II) Whether the District Court erred in dismissing appellants' complaints.

**Treaty Provisions Involved**

TREATY OF FRIENDSHIP, COMMERCE
AND NAVIGATION
BETWEEN
THE UNITED STATES AND LIBERIA.
SIGNED AT MONROVIA, AUGUST 8, 1938
(54 STAT. 1739, T.S. NO. 956).

ARTICLE I

• • • • •

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

• • • • •

• • • • •

ARTICLE VII

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

• • • • •

ARTICLE XVI

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties shall be permitted to discharge portions of cargoes at any port open to foreign commerce in the territories of the other High Contracting Party, and to proceed with the remaining portions of such cargoes to any other ports of the same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward, provided, however, that the coasting trade of the High Contracting Parties is exempt from the provisions of this Article and from the other provisions of this Treaty, and is to be regulated according to the laws of each High Contracting Party in relation thereto. It is agreed, however, that nationals and vessels of either High Contracting Party shall within the territories of the other enjoy with respect to the coasting trade most-favored-nation treatment.

ARTICLE XVII

Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party



and which maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

• • • • •

**Foreign Law Involved**

**LIBERIAN CODE OF LAWS REVISED**

**TITLE 5: ASSOCIATIONS LAW**

**PART I: BUSINESS CORPORATIONS**

[The Liberian Business Corporation Act of 1976]

**CHAPTER 2. CORPORATE PURPOSES AND POWERS**

• • • • •

**§ 2.5 Effect of incorporation: corporation as proper party to action**

A corporation is a legal entity, considered in law as a fictional person distinct from its shareholders or members, and with separate rights and liabilities. The corporation is a proper plaintiff in a suit to assert a legal right of the corporation and a proper defendant in a suit to assert a legal right against the corporation; . . . .

• • • • •

## CHAPTER 3. SERVICE OF PROCESS; REGISTERED AGENT

**§ 3.1. Registered agent for service of process.**

1. Registered agent. Every domestic corporation or foreign corporation authorized to do business in Liberia or foreign maritime trust or foreign maritime corporation registered under the provisions of section 13.1 shall designate a registered agent in Liberia upon whom process against such corporation or any notice or demand required or permitted by law to be served may be served. The agent for a corporation having a place of business in Liberia shall be a resident domestic corporation having a place of business in Liberia or a natural person, resident of and having a business address in Liberia. The registered agent for a domestic or foreign corporation not having a place of business in Liberia or for a foreign maritime trust or corporation shall be a domestic bank or trust company with a paid in capital of not less than $50,000, which is authorized by the Legislature of the Republic to act as registered agent for such corporations or trusts. A domestic corporation, authorized foreign corporation, foreign maritime trust or foreign maritime corporation which fails to maintain a registered agent shall be dissolved or its authority to do business or registration shall be revoked, as the case may be, in accordance with sections 11.3, 12.7 or 13.4.

### Statement of the Case

*Amicus* adopts the Statement set forth in the joint Brief of Appellants.

### Summary of Argument

The law of the United States grants by Treaty a right to appellants to litigate their claims in the Courts of the United States. Jurisdiction lies under both the Alien Tort Statute and the Foreign Sovereign Immunities Act because appellants' losses occurred in part within the United States, and appellee enjoys no sovereign immunity from suit in this matter. There is no alternative forum open to appellants, and the District Court erred in dismissing their complaints.



## ARGUMENT

**I. The Treaty of Friendship, Commerce and Navigation Between the United States and Liberia guarantees to the Plaintiffs-Appellants a Right of Access to the Courts of the United States Equal to That of Citizens of the United States.**

The Treaty of Friendship, Commerce and Navigation between the United States and Liberia (FCN Treaty) of 1938, 54 Stat. 1739, T.S. No. 956, guarantees generally in Article I (*supra* p. 2) "freedom of access to the courts of justice" by Liberian nationals seeking redress in the United States.[1]

The Court below recognized the juridical status of appellants, finding as a fact that they are Liberian corporations (A. 543). *Amicus* confirms that this is so, and that both are corporate nationals in good standing. Of course, both appellants have the capacity to sue and be sued. See § 2.5 of the Liberian Business Corporation Act, *supra*, p. 4.

The law of this Court with regard to standing to sue under such clauses as the ones in the present FCN Treaty was declared most clearly in *The Nordic Regent (Alcoa S.S. Co., Inc. v. m/v Nordic Regent)*, 654 F.2d 147, 1980 AMC 309 (2 Cir., 1980), cert. den. 449 U.S. 890 (1980), where in writing for a majority of the entire Circuit bench and commenting upon *Farmanfarmaian v. Gulf Oil Corp.* 588 F.2d 880 (2 Cir., 1978), Judge Timbers noted that with regard to the standard FCN Treaty phrase "access to the courts": "Such access would have

[1] By Article XVII of the FCN Treaty (*supra* p. 3), this right is made more specific with regard to Liberian corporations doing business in the United States, to wit: "They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well as for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law." While Article XVII is clearly intended to address the conduct of business of corporations of one Party within the territory of the other Party, it may be argued that the jurisdiction clause of Article XVII is applicable to this case. If so, then these corporate nationals have also satisfied the requirement of maintaining a "central office" by complying with § 3.1 of the Liberian Business Corporation Act (*supra*, p. 5), and both have appointed The International Trust Company of Liberia as Registered Agent in Liberia.

little value if the door that admits is a revolving one." 654 F.2d 147, 153, 1980 AMC 309, 318, fn. 6. Such right of access is, of course, independent of the grounds upon which relief is sought, and the appellants must bring a cognizable cause of action against a suable defendant.

Amerada Hess Oil Corporation and United Carriers, Inc. stand before the Courts of the United States in the shoes of American citizens for purposes of asserting their claims. The basic question therefore becomes that of jurisdiction over defendant-appellee, the Republic of Argentina.

**II. The Republic of Argentina Enjoys no Immunity from Suit in this Matter.**

**A. The Alien Tort Statute:**

Plaintiffs-appellants have invoked the Alien Tort Statute, 28 U.S.C. 1350: "The district courts shall have original jurisidiction of **any** civil action by an alien for a tort only, committed in **violation of the law of nations** or a treaty of the United States." (Emphasis supplied.) The U.S.-Liberia FCN Treaty provides that: "The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect **that degree of protection that is required by international law.**" (Article I, *supra*, p. 2; emphasis supplied.)

The significance of these words to *amicus* is that "**any** civil action" grants jurisdiction notwithstanding the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq.*, where the tort committed is "in violation of the law of nations", and this was the conclusion reached in *Van Dardel v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985). The Alien Tort Statute does not require that the tort be committed within the United States, nor does the FCN Treaty require that the property which is the subject of protection be located within the United States. What the FCN Treaty does require is that **appellants receive** within the United States "that degree of protection that is required by international law" for their property capable of protection by



the United States, which must certainly include the rights of appellants in and to their property. It is the violation of international law which resulted in the destruction of appellants' property that is at issue, and appellants have brought their claims within the United States upon their rights to their destroyed property.

These alien appellants seek the protection of their property rights in the Courts of the United States, alleging deprivation by a tort committed in violation of the law of nations. The law of the United States, as expressed in the Alien Tort Statute and the FCN Treaty, entitles appellants to their day in the District Court of the United States.

**B. The Foreign Sovereign Immunities Act:**

The Court below took the FSIA as controlling in this matter, and granted appellee's motion to dismiss on grounds that appellants had made out none of the exceptions to immunity in 28 U.S.C. §§ 1605-1607. The District Court found as a fact that "these Liberian plaintiffs . . . can claim no loss whatsoever occurring in the United States." (A. 548.) But in the same paragraph the Court below noted that the language of § 1605(a) has been given broad interpretation in deciding the issue of jurisdiction. (A. 547-48.)

The record before this Court shows by uncontradicted evidence that both appellants suffered losses of property within the United States.

The District Court found as a fact that the HERCULES was engaged under time charter in a routine trade between two ports of the United States. (A. 543.) The HERCULES was carrying out this domestic U.S. port-to-port trade under Articles VII and XVI of the FCN Treaty (*supra*, p. 3).

Appellant United Carriers, Inc., owner of the HERCULES, suffered the loss of their vessel while she was employed in the U.S. domestic trade, and *amicus* submits that this is properly regarded as the loss of a property right occurring in the United States. Even more directly, the owner suffered loss of the U.S. charter hire, payable in U.S. dollars in the United States. This appears from Plaintiffs' Exhibit 1A, (A. 42), which the Court

below was bound to accept as proven fact for purposes of ruling upon the Motion to Dismiss, but which was ignored by the Court.

As to appellant Amerada Hess Shipping Corporation, their loss was not only the bunkers aboard the vessel, which were sold and delivered within the United States, but also the frustration of the charterparty which caused them to lose their right to the use of the vessel in the U.S. domestic trade.

*Amicus* does not see how it is possible to characterize these losses otherwise than as occurring in the United States, and submits that the decision of the District Court was clearly erroneous in finding that "no loss whatsoever" occurred in the United States. *McAllister v. United States*, 348 U.S. 19 (1954). Both the loss to her owner of future earnings from the HERCULES and the loss to her charterer of future use of the vessel, while not quantified as separate elements of the damages, are losses from the same operative cause and are sufficient to vest jurisdiction under the FSIA, 28 U.S.C. § 1605(a)(5).

**III. Plaintiffs have no Alternative Forum.**

The District Court, in granting appellee's Motion to Dismiss, had no occasion to address the issue of *forum non conveniens*. But the record makes amply clear the total absence of any forum in Argentina or of any mutual agreement upon any other forum. There are no known assets of defendant-appellee in Liberia, rendering meaningless any suit in this matter in the Liberian Courts even before the question of jurisdiction arises. The only forum with both jurisdiction and the ability to grant relief is the United States District Court.

While it would be for the District Court on remand to consider the issue of *forum non conveniens* under either the Alien Tort Statute and/or the FSIA, this Court is already aware on the record before it that affirmance of the District Court's decision will leave plaintiffs-appellees without recourse to justice in *any* forum. That, *amicus* submits, is an element of fundamental importance which it is proper for this Court to bear in mind on the disposition of this appeal.



## CONCLUSION

*Amicus* submits that jurisdiction over defendant-appellee lies under the Alien Tort Statute without regard to the FSIA, but that the FSIA may be properly applied as well because both appellants seek money damages for losses of property occurring in the United States and caused by the tortious act of appellee.

Where no other forum is available which can offer any relief to appellants, and where the U.S.-Liberia FCN Treaty guarantees their free access to the Courts of the United States, the matter in question is an appropriate one for determination on the merits by the United States District Court for the Southern District of New York.

**The Order of Dismissal below should be vacated, and these cases remanded to the District Court for trial on the merits.**

Dated September 10, 1986

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**Certificate of Service**

I hereby certify that on this 10th day of September, 1986, two copies of the within Brief *amicus curiae* were mailed, postage prepaid, to each Counsel for the parties listed below. I further certify that, as of this date, all parties required to be served have been served.

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